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THE BUSINESS OF REPORTING CREDITS AS CONSTITUTING INTERSTATE COM- MERCE.

A Kentucky statute requires that any person, firm or corporation engaging through its agents and representatives, in the business "of inquiring into and reporting upon the credit and standing of persons engaged in business in this state" shall take out a license. A foreign corporation was engaged in the publication and distribution of a list of selected attorneys, who as its representatives agreed to furnish, upon inquiry from merchants throughout the United States, information as to the standing and credit of dealers in their respective towns and localities. These attorneys agreed to make these reports in consideration of their names being inserted in the corporation's publications as a means of securing business with such merchants. There were no reports to be made to the corporation, but about all it did was to vouch for the reliability of its list. Its profit was in circulating its publications among merchants, who in making their inquiries used the corporation's forms. The list embraced attorneys in all towns of importance in the country, but only one attorney or firm in a town, his or their consent to appointment being first obtained. The Kentucky Court of Appeals held that the corporation was through its representatives engaged in the business designated, and was not protected by the interstate commerce clause of the constitution. *United States Fidelity & Guaranty Co. v. Commonwealth*, 129 S. W. 314.

The main reliance of the corporation for its contention, that its scheme came under the commerce clause, was the correspondence school case reported under the title of *International Text Book Co. v. Pigg*, 30 Sup. Ct. 481.

The Kentucky court, however, argued, that the Text Book case merely decided,

that information could be an article of interstate commerce when it is the direct subject of interstate transaction, and did not hold, that as a mere preliminary incident in negotiation regarding possible interstate transaction it stood on the same plane as the transaction which might culminate.

There appears in the opinion much reasoning on this line, which, to our mind, could have been avoided by a briefer answer to the contention.

At the time the interstate commerce clause was framed it was also provided, that the mails were to be under federal control just as exclusively. We know that social and business letters were to be carried by the mails and that mail routes within states or across state lines stand precisely upon the same footing.

Just as relatives might seek mail facilities to inquire about relatives, merchants could do the same thing about matters of trade. In the latter use the mail is the hand-maid of commerce, but it scarcely can be called commerce. How then can it be said, that because numerous merchants have identified to them numerous others who will answer their questions about trade, the mere organizer of such a scheme is engaged in interstate commerce?

It is something of a strain even to call the information thus given commerce, but, if so, then the corporation is one degree removed from that, and the mail, and not it, is the instrumentality of commerce.

Another reason, which occurs to us which leads to the same conclusion as that of the Kentucky court is, that the corporation performs a purely intrastate service. Thus one of the corporation's subscribers writes to one of its representatives to procure and mail to him information as to a certain dealer. The representative procures the information and posts a letter containing it. With that performed, all within the state, the representative's duty ends. If a foreign corporation takes a contract to build a bridge or a railroad within a state it has been decided this is doing business in the state. Why is not the other the same thing? A different question

would be presented, if the subscribers applied to the corporation and it caused the information to be sent mediately. But even with that the former proposition would intervene.

The Text Book case involved the furnishing of details or items in a systematic course of instruction. That these went by course of mail was merely an incident, just as in what is known as a mail order business. In inquiries known to letter mail, it would be merely an incident if telegraphy were used. In the Text Book case the correspondence school is seen to transport its stock in trade across a state line. In the case we are considering there continues the same character and kind of correspondence the mails took care of from the beginning.

We think it conceivable, that an agency to report certain kinds of facts for the benefit of its customers might come within the principle of the Text Book case. Thus it could engage to furnish information about mortgages, judgments, attachments and other liens of record for its customers or for sale to any purchaser. But it is going a great way to say it constitutes interstate commerce to have a scheme for the representatives of an agency furnishing their opinions upon the standing and credit of a dealer. Ratings we know are recognized as useful adjuncts of commerce, but this is because there is a presumption of a knowledge of facts behind them. But even ratings as mere opinions are scarcely articles of commerce. Many concurring conclusions of agents about a particular subject might make an agency as well satisfied of their correctness, as where ratings are based on actual facts. That, however, does not affect the question of whether an opinion, however respected, may be an article of commerce.

Possibly it may seem that this character of reasoning is not in accord with cases which hold that telegraph companies are engaged in interstate commerce. It has seemed to us, however, that the true reason for a telegraph company being deemed to be engaged in interstate commerce is,

not that it deals in intelligence as intelligence, but because it deals in telegraphic intelligence.

When you qualify intelligence thus, you make it a wholly different thing from that which the mails provide. Doing this you do not have to consider whether it concerns trade or social or family affairs. It is distinctly an article in and of itself transported from one place and delivered in another, valuable only because it is quicker than the mail.

When, however, a scheme provides for merely desultory correspondence of a character, which the mails have always provided, it hardly seems that the taking of toll therein is under the shelter of the interstate commerce clause.

We have not discussed the Kentucky construction of its statute as covering this kind of business, but will say it seems something of a stretch to rule that these selected attorneys are agents or representatives of the corporation. The scheme rather appears to be merely a device for facilitating correspondence between principals, the corporation merely advising its subscribers that these attorneys are reliable. If this view is correct, the constitutionality of the statute as applied to this kind of a scheme may well be doubted.

NOTES OF IMPORTANT DECISIONS

STATUTE OF LIMITATIONS—ACCRUAL OF ACTION FROM DISCOVERY OF FRAUD.

—The Springfield (Mo.) Court of Appeals has lately wrought out what seems to us a singular application of an exception to the proviso of a statute declaring that right of action for a fraud does not accrue until the discovery of the fraud by the aggrieved party at any time within three years after the fraud. *State ex rel, etc., v. Musick*, 130 S. W. 398.

The facts of this case show that suit was brought on the bond of a notary public five years and eight months after he took an acknowledgment to a deed purporting to be signed by a grantor who was to the knowledge of the notary falsely impersonated by another. A special statute of limitations restricts the bringing of suits on a notary's bond to three years, but it was conceded by the court, that

this statute came within the proviso above set out.

The opinion says: "The petition alleges that the fraud complained of was discovered by relator within three years before the commencement of her suit. It does not allege what the discovery was, nor does the proof show that it was on account of anything that defendant (the notary) said or did that it was not discovered earlier. Those facts, if true, do not of themselves, under the law of this state, bring the case within the exception which would prevent the running of the statute of limitations; but there must have been some act done by defendant to lull the relator into non-action or prevent her from discovering the fraud, and the concealment of the facts by mere silence was not enough."

Looking at the petition we see it alleges that the fraud complained of was discovered "within three years, etc.," and the fraud complained of was the taking by the notary of a false acknowledgment. It also alleges reliance on that acknowledgment in the acceptance of the deed. The petition alleges then not merely silence in concealment but it distinctly alleges an affirmative act of deceit, and reasonably it is to be construed as alleging continuous affirmative deceit. Every day since that acknowledgment was taken this official act reaffirms its truthfulness, for if it does not it becomes *functus officio* as a legal act. Plaintiff alleges she was lulled by an affirmative act. Reassertion could do nothing more for it, just as denial could do nothing against it. The act imported verity. In *State, etc., v. Hawkins*, 103 Mo. App. 251, it was ruled that fraudulent concealment of a false acknowledgment tolled the statute and this is true because by concealment he was continuously asserting its verity.

This is not like a personal fraud perpetrated on another, who carelessly with the means at hand to discover what it is, allows his right of action to slip away. Such was the situation in *Callan v. Callan*, 175 Mo. 346. Nor is it like such a case, as was *Shelby County v. Bragg*, 135 Mo. 291, where other records in possession of county officers demonstrated the fraud perpetrated and county officials were negligent in not discovering the fraud.

In the case we are considering there was an example of an act having continuous official life and the most effectual lulling of one into security with respect to it is the continuous assumption of its verity. Whether it might be said that a grantee in a deed is negligent in not tracing the title might depend on circumstances. This may have been wild land as to which there was merely constructive possession and it may easily be that failure to dis-

cover such a fraud as was sued on was not negligence, or least made that a jury question. But this case does not seem to have been turned out of court on that theory.

A GLANCE AT EQUITY JURISDICTION IN CERTAIN LINES, AND AT THE QUESTION WHETHER IT IS DULY APPRECIATED — A CRITICISM OF THE CASE OF *STRAWN v. TRUSTEES OF JACKSONVILLE FEMALE ACADEMY*.

The maintenance of chancery jurisdiction in its full vigor is so important, in some of our states, at least, that some consideration of the subject would seem to be timely.

There was an old-time idea, applicable to those states in which there are courts of law and courts of equity, and in which the distinctions applicable thereto prevail, that enactments conferring on courts of law the same remedial faculty in substance which has belonged to courts of equity does not, in the absence of prohibitory or restrictive words, oust or repeal a jurisdiction previously subject to be maintained by the latter courts.¹ But in construing the multitude of statutory provisions concerning the jurisdiction of various courts this principle, it is believed, has too often been overlooked or forgotten in practice. The result has been that the law's uncertainty has had fresh and unnecessary illustration, with attendant evils, including not a little expense and unnecessary discomfiture.

Sir Wm. Blackstone rightly regarded the court of equity as one of the greatest judicial consequence.² While he viewed the ordinary legal court as the more ancient, yet this did not in his judgment, entitle it to higher consideration, both courts being "bottomed upon the same substantial foundations."³

Equity, as a system of jurisprudence, has been supposed to be "supplemental to

(1) 1 Story Eq. Jur. sec. 641; *Varet v. N. Y. Ins. Co.*, 7 Paige Ch. 560.

(2) 3 Bl. Com., *49.

(3) *Id.* *47, *439.

law, properly so called, and complementary of it."⁴ Certainly the latter part of this definition should have full weight given to it.

The Equity Jurisprudence exercised in the U. S. is in the main coextensive with, and in most respects conformable to, that of England, as embracing like matters and modes of remedy.⁵

As tending to give distinctness to an answer to the question at the head of this article, reference may now be made to a case recently reported, entitled *Strawn v. Trustees of the Jacksonville Female Academy*.⁶

The official report of that case would not in itself justify the use of the case for much illustration. It would not form a text sufficiently broad or enlightening. For upon reading it, one might say, the statement of the case as made in the report, was its answer. In such statement, the court characterized the bill as one filed for the construction of certain clauses in the will of Phebe G. Strawn, deceased, and in the opinion it was declared, in the outset, that there was no ambiguity in the will. Such a bill could be of little consequence. But the court then stated that the object of the bill was "to determine and declare the effect" of a transaction between the Trustees of Jacksonville Female Academy and the Trustees of Illinois College, by virtue of which the property of the former institution was, before the taking effect of the will, transferred to the latter upon an arrangement between the two institutions which caused the grantee, the College, to become co-educational, the Academy ceasing from the time of such transfer to use its educational functions or franchise, and reserving to itself only the power to have \$50,000 refunded to it by the College, if at any time in the future the College should cease to be co-educational, affording females equal privileges with males for education.

The theory of the bill, as explained in the statement of the case given in the report, was that the legacy and devise which the testatrix intended for the Academy, was subject to a requirement that the fund and property should go to an active and live corporation, and that the body so named had, before the taking effect of the will, become dormant and inactive and disqualified from complying with the terms and conditions imposed by the will.

It was added that the residuary legatees and devisees claimed that the legacy and devise had lapsed and become a part of the residuary estate, and that the complainants being executors and trustees under the will, should not therefore allow such legacy and devise to be taken by the Academy, and further that such executors and trustees would become personally liable if, under the circumstances stated, they gave over the money and property to the institution which had thus become dormant and had merged itself with the college.

We concede that it was proper enough in the reporter to confine his part of the work to what was actually the reason assigned in the opinion of the court, for its decision, that being the most essential part of the report, or, as Sir Edward Coke would have said, "the resolution of the judges."

Yet in order to make use of the case as somewhat illustrative of the subject here chosen, some enlargement must be made upon the statement of it in the official report.

Additional matters, in part outlined or in a manner suggested in the syllabi, statement and opinion in the case remain to be mentioned as showing that the bill set forth facts supposed to be significant as justifying an application to a court of equity, not really for a construction of the will, but for instructions to the complainants in their capacity as executors and trustees, and for the aid and direction of such executors in the administration of the estate.

(4) Webster's Dict., Equity.

(5) 1 Story's Eq. Jur., sec. 57.

(6) 240 Ill. 111.

The bill averred that while a considerable portion of the legacies made by the will had been paid by the executors, it would yet be necessary to dispose of some of the real estate in order to provide funds for the payment of the residue of such legacies and the costs and expenses of administration. Power was given by the will to the executors to sell real estate for the payment of debts, legacies and bequests; also to make partition of lands as between the residuary devisees, or to sell the lands at auction in case partition should not be agreed upon. It was therefore desired by the bill to have instructions as to whether the legacy under consideration must be recognized as payable; which instructions would be needed to determine how much real estate should be sold, and also should of course precede the making of partition.

The will provided as to the legacy of \$10,000 to the Trustees of the Jacksonville Female Academy that the sum named was to be kept by said trustees as a perpetual fund, the income from which was to be used in maintaining a high-grade school for the education of young women. The bill referred to the charter of the Academy as providing that the trustees should hold the property of the institution solely for the purpose of female education, and as requiring that in case any devise or bequest should be made for particular purposes accordant with the design of the institution, and should be accepted, the same should be applied in conformity with the expressed conditions of the donor or deviser.

It was also declared by the bill that serious doubts and difficulties with reference to the powers and duties of the complainants in reference to the carrying out of the provisions of the will and codicil thereto as to such bequest and as to a devise covering the homestead property of the testatrix, existed, and that upon advice of counsel, that there was just cause so to do, the complainants deemed it prudent and proper for their protection, to ask for instructions from the court in the premises, and for such directions as the court might

find to be necessary and proper, the complainants being informed and stating the fact to be, that without such instructions or directions they could not safely proceed to carry out the provisions of the will and codicil. The bill also averred among other things, that the academy had permanently disabled itself from meeting or complying with the conditions imposed by the legacy and devise, and that such legacy and devise had lapsed. Also that such corporation was not prepared to use either the bequest of money or the homestead property in the manner required by the will, nor according to the trust conditions declared by the testatrix, and was not entitled to take the gifts and abnegate the trusts connected therewith, nor to transfer the same to the college, as had been attempted or as was apprehended.

The bill showed, as to the homestead property, that it was devised to the executors as trustees, but that they were to allow it to be used and occupied by the three sons of the testatrix during their joint lives and the life of the survivor of them who might occupy the same, and that the same was not to be conveyed to the trustees of the academy until such occupancy should cease. Also that the will provided as to such homestead property that when so conveyed to the trustees of the academy, the conveyance should be subject to the conditions and limitations, among other things, that it should be held, used and enjoyed by the trustees of the academy "as a site for an art gallery and school of art to be known and designated as the 'Strawn Art School and Gallery,' such school and art gallery to be under the management and control of said trustees as an annex, and to be used in connection with the school known as the Jacksonville Female Academy." Such deed was also to contain a provision or condition that when the premises should cease for a period of three consecutive years to be so used, then the rights of the trustees of the academy under such deed should cease and the premises should thereupon revert to the executors, who would thereupon have power to sell the same at public auction for

the benefit of four certain corporations, two of which were the trustees of the academy and the trustees of the college.

The bill alleged that the disability as aforesaid, under which the academy had placed itself at the time of the taking effect of the will and codicil, had continued, and was designed to be permanent.

From other averments, an inference was deducible, that the devise having lapsed, there was an acceleration of remainders, and that especially as to the one-fourth interest in the homestead property which the academic corporation would, under other circumstances take, upon a sale of the homestead by the executors, the devise to that corporate body having lapsed, such portion or interest would go to the residuary legatees and devisees, and the power of the executors to sell the property had thus become immediate.

Upon demurrers of the trustees of the academy and the trustees of the college, respectively, the Circuit Court of Morgan County, in which court the suit was brought, dismissed the bill. The judge presiding expressly declined to consider whether the legatee, known as the trustees of the Jacksonville Female Academy, was still capable of accepting the money bequeathed to it. He supposed at the time of delivering his opinion, that an Act of the General Assembly of Illinois, passed in 1905, to extend the jurisdiction of county courts, was in force. The Act which he thus had in mind, had not been cited in the argument of the case, and had been previously decided by the supreme court of the state in *Lynch v. Hutchinson*⁷ to be unconstitutional. Supposing that Act to be in force, his Honor expressed himself to the effect that the probate court, meaning in the case in hand the County Court of Morgan County, Illinois, it having jurisdiction of probate matters, had full power to direct the executors and trustees in the matter of the legacy involved in the case. He adhered to that opinion when notified of the fact that such Act was not in force. No expression was made as to whether the case would in the

absence of that statute, have been one for equity cognizance, nor as to whether the statutes under which the probate court could act in such matters allowed concurrent jurisdiction; but it was suggested by his Honor that the executors could go into the probate court and get all the orders necessary.

As to the legacy, a suggestion similar to the one last stated was made in the opinion of the supreme court, basing it on two sections of the Illinois statute on "Administration of Estates," as that statute then stood. One of such sections allows the probate court to order the payment of legacies when there are sufficient assets to satisfy all demands against the estate, and the other provides that a legatee may have his action of account or a suit in equity against an executor who is delinquent in his duty to recognize or discharge the legacy, the court having first ordered the same to be paid.

It was, of course, well known that the executors could, as to the legacy, have awaited action in the probate court. If the legatee had chosen to move there, the court could have determined whether the legacy was due, and might have ordered the executors to proceed to realize from the property the money, if any, to be paid the legatee. And as the supreme court's opinion suggests, the probate court would undoubtedly have had power to construe the will, so far as might be necessary with reference to the right of the legatees. But was the jurisdiction of the probate court, such as it was, of an exclusive character, or was it entirely adequate to give the executors such relief as they asked, or such aid and direction as would ordinarily flow from a bill in equity addressed to a court having its regular forms of process of bringing before it all parties interested, and having also full power to pass upon all the questions involved in the case? Were the executors to await a proceeding against themselves in the probate court, or could they take the initiative and go into a court of chancery, the powers of which were more ample and meet for the different contingencies existing or likely to be found? Originally, it may be said, the executors were to consid-

(7) 219 Ill. 193.

er or be advised, whether there would be concurrent jurisdiction as between the probate court and the court of chancery, and especially whether the powers vested in the former of those courts would be adequate to give all proper relief. But the probate court was one of limited powers, and would be expected according to the statutes cited, to make its order as to the payment of any particular legacy only when it should appear that there were "sufficient assets to satisfy all demands against the estate," in which case alone could it make an order for the payment of the legacy.

The case, however, as made by the bill, was one in which there were not as yet sufficient assets for the satisfaction of all demands against the estate. The necessity of selling real estate to satisfy a part of such demands remaining unpaid existed; and to determine how much should be sold required a decision whether the particular legacy was enforceable. Here was a contingency with reference to which the right of the executors to go into a court of equity for advice was, it would seem, with all due submission, clear. Under similar conditions, *Whitman v. Fisher*,⁸ to go no further, would abundantly sustain equity jurisdiction. Nor was this the only foundation for such jurisdiction.

That there was such jurisdiction so far as the devise was concerned, was not questioned by the court, though it was thought that the time had not come "for asking the aid and direction of the court of equity" in that matter. The property, that is to say, the title to the homestead property, was by the will vested in the executors; but, as already stated, there was when the bill was filed, an existing right of occupancy by the three sons of the testatrix, or the survivor of them, and the intimation of the court is that while that right existed, there was no need of action by the executors, and therefore no need of advice. Yet, the preceding suggestions go to show that there was propriety in bringing to the attention of the court the provisions as to the devise

as well as those in regard to the legacy, in construing the will.

These provisions were of a complementary character. They were to be taken together. Those relating specifically to the homestead threw light on those which related in direct terms to the legacy. The will was to be construed as a whole. When so construed, the need of an organism having life, and showing it by personal or independent action, was made apparent. The intention expressed by the testatrix was that the object of her intended bounty, whether claiming the legacy or homestead property, should be in life, and should itself perform the trusts or conditions stated with reference to the proposed gifts.

While it was true that the right, if any, to the legacy, was inchoate until assent thereto was given by the executors, or until the law stepped in to enforce the right,⁹ there also existed a question whether the corporation named in the will as being selected for the carrying out of the object declared by the testatrix, would elect to take the homestead burdened with the condition which was the purpose of the gift. Acceptance was necessary to title on the part of the intended devisee.¹⁰ What was believed to be a disclaimer or renunciation by such devisee of the gift was set forth in the bill, in showing a substantial merger of the academy with the college, causing the former body to become dormant and inactive. In this state of the case, there was such a suspension of the academy as to amount to a virtual dissolution.¹¹

Equally with reference to the devise as with reference to the legacy, the donee had practically ceased to exist, or at least to occupy the situation upon which the testa-

(9) 1st Roper on Legacies *556; 2nd Williams on Executors, 6th Am. Ed. (1373).

(10) 18th Am. & Eng. Ency. of Law, 743.

(11) *Miller v. Riddle*, 227 Ill. 53, 57; 2 Kent's Com., *311, 312; *Moore v. Whitcomb*, 48 Mo. 543; *Houston v. Jefferson College*, 63 Pa. State (13 P. F. Smith), 428, 10 Cyc. of Law, 1300D, 1301E; *Bullard v. Town of Shirley*, 153 Mass. 559, 12 L. R. A. 110; *Teele v. Bishop of Derry*, 168 Mass. 341; *Stratton v. Physio-Medical Institute*, 149 Mass. 505, 5 L. R. A. 33; *Cooper v. English*, 83 Ill. App. 148; same case, 183 Ill. 23, 210.

(8) 74 Ill. 147, 155, 156, 157.

trix' bounty was predicated; and hence there was a lapse of the devise as well as of the legacy.¹²

In like manner, both as to the devise and the legacy, there was mutuality of consideration and requirements respectively, and the demission or surrender by the academy of its academic life or functions was a material circumstance and might be said to be equivalent to a disclaimer of the gifts.¹³

The allegations of the bill standing admitted by the demurrer, the academy was no longer a "going" entity.¹⁴ Its merger with the college was presumably irrevocable, and neither of the two corporations expressed any inclination to revoke such merger.¹⁵

Without enlarging specially upon the reasons for presenting in the bill the character of the claim of the academy with reference to the homestead, and the precise similarity it bore to the matter of the legacy, it is to be noted that if the right of the academy to the legacy had lapsed, such right had also lapsed as to the homestead, especially upon applying the doctrine of disclaimer or renunciation. The existence then of a right on the part of the sons of the testatrix to the occupancy of the homestead, did not stand in the way of a decision by a court of equity as to the rights of the executors, under the circumstances stated in the bill.¹⁶ It was still a case as to the homestead for construction, if the time was ripe, and thus a case in which the propriety of proceeding in a court of equity is practically conceded; for the probate court had no jurisdiction in that regard.

We should also mention a principle, often recognized by chancery courts from an early period in their history, that: "A court of equity has power to avoid multiplicity of suits, and whenever it has jurisdiction of the subject matter and of the parties in in-

terest, it will see to do complete justice,"¹⁷ thus disfavoring litigation by piecemeal. Upon the case predicated by the bill, there would be an acceleration of remainders by reason of the lapse of the devise to the academy, and it might be or would be the right and duty of the executors and trustees to sell the interest vested in them, whether it was direct or of a reversionary character. But, at any rate, it was not a case in which lapse of time would bring new rights, or give rise to the necessity of new parties; hence it is submitted that it was reasonable to ask for a decision in a court of equity as a matter of instruction or direction to the executors, not only as to the legacy, but also as to the devise.

The right of the supreme court to hear the case upon appeal from the circuit court came from the fact that the case, so far as it concerned the homestead property, involved a freehold. If, therefore, the court assumed jurisdiction of the case for some purpose, as it did, would it not have been consistent with the practice in equity to pass upon the case, not only in part, but as a whole? Such cases, for example, as are shown in a note,¹⁸ seem to favor an affirmative answer.

It has been seen that the supreme court chose to treat the case as one for the construction of a will in which there was no ambiguity, and to deny to the executors any special standing in a court of equity in the matters involved; perhaps because it was thought they would be safe from loss if they looked to action in the probate court alone. It might be implied from the opinion that the court thought the case to be an attempt to take from the latter court the administration of the estate, in so far as it concerned the rights or claims of the academy. On the other hand, the theory of the bill, as has been seen, was, that the complainants occupied the character of trustees, and as such, or, we may say, as executors, sought advice and assistance in the discharge of their duties, not to withdraw

(12) 18 Am. & Eng. Ency. of Law, 747.

(13) *Cohan v. Wold*, 85 Minn. 302, 307, 310; *Chamber of Commerce v. Sollitt*, 43 Ill. 519; 1 *Lewin on Trusts*, *145.

(14) *Mason v. Bloomington Library Ass'n.*, 236 Ill. 442, 449.

(15) *Miners' Ditch Co. v. Zellerbach*, 37 Calif. 543; 99 Am. Dec. 300.

(16) *Kallish v. Kallish*, 166 N. Y. 368, 371.

(17) *Morrison v. Morrison*, 140 Ill. 560.

(18) *Williams v. Williams*, 135 Wis. 60; *City of Rock Island v. Central U. Tel. Co.*, 132 Ill. App. 248, 258.

from the probate court any part of the usual administrative details, but to facilitate the management of the estate and the closing of it through that court.

We are not without apprehension that in treating the case as merely a bill to construe a will which was clear and unambiguous, the court left out of view important features of the case.

The opinion in the supreme court cited as authority in the matter of equity jurisdiction, and as if adverse to such jurisdiction, in respect to bills to "construe wills," Page on Wills, section 806, and later the court also cited section 807 of the same work. If such citations had been so made as to be open for discussion, it could readily have been shown that the author, in treating briefly, as he does, of a general subject, did not take up for consideration such a case as we have been analyzing. He refers to cases so different in character that a special case should not be made to turn on either of the two passages without discrimination. By this observation we mean, for example, as to section 806, that in perusing that passage to see whether it should be applied to a case as authority for declining to sustain a suit in equity one should consider whether such suit is merely for the purpose of construing a will, or whether it may not have another purpose, as, for example, to obtain for an executor or trustee either advice or assistance, or, as in the case reviewed, whether there is not an exigency to sell real estate, such legacy being disputed, and it being desirable to end the dispute, and thus see how much real estate should be sold to pay debts, legacies and costs or expenses of administration.

Some hints relative to the briefs submitted to the circuit judge will help to explain the distinction, and also to show how far it was pointed out.

On the part of the trustees of the academy, with whom counsel for the trustees of the college united in argument, the briefs suggested that the question whether the executors should pay over the legacy, was a question of law, and that the academy had a legal right to take the legacy, the actual

existence of the academy as a corporate body being supposed. Hence, it was argued that as the right of the trustees of the academy to the money presented a question of law, the parties concerned in respect to it should be remitted to their remedy at law.¹⁹

It was shown by a brief in reply that the cases thus cited, excepting that of *Whitman v. Fisher*, heretofore noted, were cases brought by devisees or claimants under wills, setting up supposed rights which were determinable by an appropriate action at law; and the attention of the court was called to the fact that a distinction was maintained between bills in chancery filed in cases so cited by defendants' counsel and bills filed by executors to obtain the construction of wills in cases either of trust, or of reasonable doubt or difficulty, which distinction was pointed out in one of the cases cited by adverse counsel, namely, at pages 111 and 112 in 203 Ill. Also as sustaining the rights of executors in such cases to proceed in equity, counsel for the complainants cited cases mentioned in a note following.²⁰

In the briefs submitted for the two corporations by their counsel in the supreme court, the citation of cases which they had presented while the case was in the circuit court was not renewed, with the exception of the case of *Whitman v. Fisher*, *supra*. Full reference, was, however, made by counsel to different sections of the statute in regard to administration of estates, and it was additionally suggested, in substance, that the probate court had exclusive jurisdiction over the administration of the estate unless there was some special reason for taking the matter of administration away from that court.

On the part of the complainants the briefs in the supreme court brought to the notice of that court the suggestion that the complainants were even as to the personality

(19) In support of this proposition the counsel cited *Harrison v. Owsley*, 173 Ill. 629; *Strubher v. Belsey*, 79 Ill. 307; *Whitman v. Fisher*, 74 Ill. 147. The counsel has previously cited *Mansfield v. Mansfield*, 203 Ill. 92.

(20) *Bridges v. Rice*, 99 Ill. 414; *Stoff v. McGinn*, 178 Ill. 46. *Whitman v. Fisher*, 74 Ill. 147.

to be considered not merely as executors in the strict sense of that term, but also as trustees, citing to this point authorities mentioned in part in the subjoined note.²¹ Also as to the right to proceed in a court of equity, reference was made to authorities cited in the next note.²² Reference was also made to other authorities, to the effect that courts of equity exercise liberally the power to construe wills when it is needful to do so for the advice and assistance of executors and trustees in cases of doubt and difficulty, or where there are conflicting claims. And it was suggested that the county court, exercising probate jurisdiction, could not give full or adequate relief, and also that such jurisdiction as the county court might be supposed to have, did not determine or do away with the pre-existing jurisdiction of a court of equity not expressly abridged by the statute.

The statute in regard to administration of estates which was in force when the decision was rendered, gave to the legatee a remedy, by allowing such legatee to take action before the county court having probate jurisdiction; but it did not provide for a correlative form of proceeding in that court on the part of the executors. This was the reason for the distinction in some measure pointed out above between a proceeding by a legatee or devisee, for example, in a court of equity for the determination of the rights of such legatee or de-

visee, and a proceeding there by an executor.

The decision was rendered before the passage of the Act of the General Assembly of Illinois entitled "An Act to extend the jurisdiction of probate courts and county courts having probate jurisdiction so as to include the complete administration of testate estates," approved June 14, 1910.

It would be somewhat foreign to the title of this paper to go more fully into the matter of the distinction made in equity between cases brought by legatees or devisees to establish legal rights on their part and cases brought by executors to obtain assistance or direction or guidance. There is a line of separation depending in part on the question whether the party suing has a full and adequate legal remedy, through action at law, and in part upon whether the subject matter to be considered is a trust with respect to which a court of equity should intervene.

It would extend this paper too much to attempt a full classification of the cases marking out or bearing upon the distinctions named. But reference is made in a note to two recent Illinois cases, one of them brought by an executor when some parties concerned differed as to how the proceeds of the sale of certain real estate should be applied, and the other brought by one who claimed to have a legal title to the property covered by a will. The two cases mark to some extent a distinction suggested. But it should be remarked that such distinction does not bar the right of an executor to apply to a court of equity for instructions or assistance when needed in aid of administration.

It is, however, appropriate to say that the decisions in Illinois have, as it is believed, pretty generally allowed to a court of chancery a right to advise or instruct executors and other trustees in cases of doubt or difficulty, unless the case herein specially noticed be treated as an exception. That there might be danger of it being so treated, seemed to justify dwelling upon it

(21) 1 Williams on Exrs., 6th Am. Ed., 294 (bottom paging)*; 3 id., 2005 (bottom paging); 2 Story's Eq. Jur., Sec. 1208; Bowers v. Smith, 10 Paige, 193; Reeder v. Meredith, 78 Ark., 111; Griffith v. Frazier, 3 Cranch, 9, 24; 5 L. Ed., 471, 476; Kendall v. Creighton, 23 How. (64 U. S. 90; 16 L. Ed., 419, 423. 1 Lewin on Trustees, *350, *368.

(22) Goodhue v. Clark, 37 N. H., 530; Treadwell v. Cordis, 5 Gray (Mass.), 341. Missionary Society v. Mead, 131 Ill., 338. (Bill was filed by exrs. p. 243, id.) Howe v. Hodge, 152 Ill., 252 (The Exrs. filed the bill, id. 258); Hawley v. James, 5 Paige, 318, 488; 11 Am. and Eng. Ency. of Law, 910, 1245; 8 Ency. of Pl. & Pr. 698; Minkler v. Simons, 172 Ill., 323; Miller v. Riddle, 227 Ill. 53; Whitman v. Fisher, 74 Ill. 147, 157; Leslie v. Moser, 62 Ill App. 555, 559; Wilson v. Ill. Trust & Savings Bank, 166 Ill., 9, 13-14; Kemmerer v. Kemmerer, 233 Ill., 327; Hooper v. Hooper, 9 Cush., 122, 127; Dimmock v. Bixby, 20 Pick., 368; 2 Story's Eq. Jur., 961, 1067; Hill on Trustees, *343.

to the extent at least of making some comments concerning it. In doing this, we have wished to question whether it was right that the case should turn on the suggestion in the opinion that no trust was, as to the legacy, reposed in the executors of the will. It is surely a question whether the court should have held that the executors were not to be treated as trustees when they held the personal estate in that character for the benefit of creditors and legatees. Nor are we inclined to think that a court of equity would deliberately put aside some considerations which entered into the case when fully explained, but which are not expressly treated in the opinion; considerations tending to show need for a determination of existing rights affecting both the legacy and the devise.

It was a theory of the bill, as may be inferred from what is said above, that a question whether the academy could rightfully ask payment of the legacy was necessary to be considered, although there was no formal dissolution of the body as a corporation, since it had ceased to carry on its special corporate functions. The disability was supposed to be such that the corporation could be said to have incapacitated itself to carry out the conditions of the gifts intended for it provisionally; and further it was asserted that such incapacity was of a permanent character, or not expected to be removed. This matter was argued from the authorities, at some length, but was not passed upon in the decision.

It was also a theory of the bill that the case was not one for a *cy pres* application. As to this feature of the case, an argument could be made to support jurisdiction in chancery, but it would lengthen this paper too much to enter upon the discussion of the question.

The case as above stated, involved several questions of importance. They were such as to call for study, and for the exercise of judicial learning and experience. They were also of a class, the consideration of which comports with the high character of a court of chancery, and from which that

court does not usually shrink. Fortunately or unfortunately, some of them were not passed upon, and hence do not appear in the statement of the case, nor in the opinion. No case of the same special features is likely to imprint itself on the web of time. But the case principally noticed herein must stand in its loneliness, for so much of a precedent as is meet.

In the outset, the fact that there were such questions, which were likely to be involved, made it the duty of counsel to consider what course of action on the part of the executors should be pursued, to cause a safe closing of the estate without unnecessary litigation. On the one hand, the executors could, as we have seen, await a movement in the county court on its probate side, in the shape of a motion for a rule to proceed, or, as the law concerning the administration of estates then stood, the legatee could bring an action against the executors, and in such a case there could be an appeal from the county court to the circuit court and thence to the appellate court, and finally to the supreme court. But supposing a court of chancery to be competent to give its advice and assistance, not only as to the legacy, but also as to the devise, would not that court have seemed to be the one to choose for direct effectiveness and the best results all around?

The tendency of legislation seems to be towards the enlargement of jurisdiction of the tribunals of a local order, as witness the Act of June 14, 1910, in Illinois, above mentioned, and we have not designed to argue against it, though we consider it right to ask the court of chancery to hold its former jurisdiction until it be taken away by statute, thus following a doctrine which the Supreme Court of Illinois, following the general rule on the subject, committed itself in former times.²³

A learned writer spoke of the system of equity as having "a sisterly entireness of its own," which means a kind and graceful exercise of its jurisdiction. Another referred to equity as having gradually shaped

(23) *Labadie v. Hewitt*, 85 Ill. 341.

itself into a refined science, requiring for its mastery long and intense application.

In introducing some illustrations of those ideas, we speak for no startling independence on the part of the court, but yet have wished to intimate somewhat decidedly, that there is danger in dismissing causes hurriedly or unnecessarily, to send suitors to a different tribunal, whose judgment must be less final, and subject to more appeals.

It is our desire to commend an observation of Lord Eldon, made in the case of an appeal to him, after a rehearing at the Rols, in *Brown v. Higgs*.²⁴ He said: "Suitors have a right to the deliberate attention and deliberate judgment of every court, in every stage, in which according to the constitution the cause may proceed."

Especially in cases in chancery is such attention often required, to secure a wise administration of the law, and not less is breadth of view on the part of a chancellor a prime quality.

THOMAS DENT.

Chicago, Ill.

(24) 8 Ves., *561, *567.

MORTGAGES—ESTOPPEL.

ROTHSCHILD v. TITLE GUARANTEE & TRUST CO.

(124 N. Y. Supp. 441.)

Supreme Court of New York, Appellate Division, Second Department, July 29, 1910.

A's son forged her name to a mortgage. After discovering it, she made two payments of interest thereon without any fraudulent intent whatever, and without any design to shield her son. Held, that her duty to inform the mortgagee of the forgery was not such as to estop her from claiming its invalidity.

HIRSCHBERG, P. J.: The judgment here-in directs the defendant to give up a mortgage recorded in the register's office of the county of Kings, to be canceled and discharged of record, and to execute and deliver to the plaintiffs a satisfaction for that purpose. The mortgage covers real estate owned at the time of its date by Caroline Strauss, now deceased, and it is conceded that her signature to the instrument was forged by her son. The record contains none of the evidence taken on the trial, and the appeal has been heard and is

to be determined solely upon the judgment roll and the facts found by the learned trial justice, on the defendant's requests, and the exceptions taken by defendant to the findings of law. The point presented is that Mrs. Strauss made some payments of interest on the bond and mortgage after discovery of the forgery, whereby, the appellant claims, she became estopped from afterwards denying the validity and integrity of the instrument.

It seems unnecessary to analyze the many cases presented by the learned counsel for the appellant, inasmuch as none of them holds that the mere payment of the interest money, with a knowledge of the forgery and without disclosing that fact, estops the plaintiff, in the absence of any proof that the holders of the instrument were thereby prevented from enforcing any remedy in their power, and in the absence of any proof that their position in the premises was thereby changed to their disadvantage. The court has found as a fact that Mrs. Strauss made two payments of interest with knowledge of the forgery. She died shortly after the second payment. The court has also found, presumably on sufficient evidence, that such payments were made without fraudulent or wrongful intent, and has refused to find that they were made with any design of shielding her son from the consequences of his wrongful act, or that the payments in any way prevented the holder of the mortgage from discovering the forgery, or from taking any lawful steps which might have resulted in the recovery from the wrongdoer of the amount of the loan secured by the mortgage or any part of it.

In the circumstances it cannot be said as matter of law that there was such a duty upon the deceased to disclose the infirmity of the security, when she discovered it, as to create an equitable estoppel on her failure to do so. It cannot be said that the mere payment of interest ratified the unauthorized and unlawful act of her son in forging her name, and it follows that the judgment should be affirmed. All concur.

NOTE.—*The Underlying Principle of Estoppel in Respect of Forged Paper.*—At page 491, of 46 Cent. L. J., the question of ratification of a forged instrument is considered and many cases discussed, and the result is there summarized in the words of 2d Daniel Neg. Inst., § 1352, as follows: "We cannot see how any mere promises to pay a forged note can lay the foundation for liability, when there appear no circumstances to create an estoppel." The principal case merely extends this rule so as to make the payment of interest nothing but the part performance of a mere promise to pay and good, if what is voluntarily paid cannot be recovered back, only *pro tanto*.

This situation points to what seems to us an inconsistency on the part of those courts, which hold that an innocent acceptance or payment of a forged draft leaves the acceptor or payor without recourse. See 70 Cent. L. J. 417; 71 id. 139, 147.

The case of *Barry v. Kirkland* (Ariz.), 52 Pac. 491, referred to in 46 Cent. L. J., *supra*, showed that a note was renewed by a maker who forged signatures of the sureties thereon. After its maturity and without consideration, the sureties promised to pay, under the belief that they had signed the note. The payee was not induced by such promise to omit or do anything to his disadvantage. There was held to be no estoppel against the sureties. Here was an instance where the original liability of the sureties was discharged upon a mistake, but when they mistakenly agree to pay the substituted paper they had never signed, the promise was held not binding. And yet when an innocent acceptor or payor pays or accepts a forged draft, an old precedent, which has outlived its usefulness, stands in the way of correcting an injustice.

The rule of estoppel is found in such decisions as that of *Henderson v. Anderson*, 3 How. 73, which announces the principle that where a party to a negotiable paper gives it value and currency by the sanction of his name, he cannot repudiate it. The implication is that were it not negotiable, there would have to be a consideration and as well though negotiable, if the paper remains in the hands of the original holder, as both value and currency must be considered.

Even also a conclusive presumption of estoppel may sometimes arise in behalf of the original holder. Thus a corporation that has received the benefit of a loan upon its unauthorized note, cannot for a long time acquiesce, by silence and then repudiate. *Curtin v. Salmon River, etc.*, Ditch Co.; 141 Cal. 308, 74 Pac. 851, 99 Am. St. Rep. 75.

In Missouri it was held that where plaintiffs paid interest on a note after they were informed that it was given for a debt for which they were not liable and that it was obtained by deception and without consideration, such payment did not ratify the note. *Beland v. Anheuser-Busch Brewing Ass'n*, 157 Mo. 593, 58 S. W. 1. *A fortiori* it would seem if the note were a forgery. See also *Swinney v. Edwards*, 8 Wyo. 54, 55 Pac. 306, 80 Am. St. Rep. 916.

Renewals of a note obtained fraudulently do not necessarily show ratification, but all the circumstances are to be looked into to ascertain what was the intent and if there is any consideration. *Strickland v. Graybill*, 97 Va. 602, 34 S. E. 475. See also *Oldoere v. Stuart*, 122 Ala. 405, 25 So. 38.

In Georgia it would seem the rule is opposed to that announced in the *Beland* case, *supra*. *Atlanta Consolidated Bottling Co. v. Hutchinson*, 109 Ga. 550, 35 S. E. 124.

But it may be said generally, that there must be something of detriment of which the law will take notice before any one will be held on a promise, no matter in what form it purports to be, if there is no consideration therefor, and ratification cannot rise higher than the source of what is ratified. C.

CORRESPONDENCE.

THE FRATERNAL SOCIETY LAW ASSOCIATION—A MOVEMENT FOR UNIFORMITY IN FRATERNAL INSURANCE LEGISLATION.

Editor Central Law Journal:

The writer's attention has been called to an editorial which appeared in 71 Cent. L. J. 129, in reference to the appointment of a Committee on Fraternal Insurance upon the part of the American Bar Association.

I am enclosing you under separate cover a marked copy of the minutes of the Fraternal Society Law Association which was organized in Chicago last winter for the purpose of co-operation among the lawyers who were interested in that particular branch of the law relating to Fraternal Beneficiary Societies.

We have a membership now of nearly one hundred and quite a number of additional applications, all of which indicates that there is a very wide-spread interest in this organization and that its purposes will be realized.

I am taking the liberty of calling your attention to this because I feel, in view of the expressions through your column, that you were not acquainted with this Society and the scope of its operations.

We believe that this Society will contribute towards a similarity of rulings in the different states and the establishment of certain fixed and definite principles which differentiate fraternal beneficiary societies from the ordinary insurance companies.

I believe that the purposes of the editorial can be more fully and successfully met by this Association than any other way. I have the honor to remain,

Yours very truly,

OLIN BRYAN,
President.

Philadelphia, Pa.

Note:—Our interest in this subject is further shown by discussion in 70 Cent. L. J. 273, under title "The Right of Fraternal Insurance Societies to Change their Rates." We think it something of a reproach that uniformity in law on so important a subject has been so lagging. We are glad, indeed, to learn of the movement mentioned, and shall lend it our hearty support. The officers of this new and important law association are as follows: President, Olin Bryan, Philadelphia, Pa.; vice-president, A. H. Burnett, Omaha, Neb.; secretary, Carlos S. Hardy, Los Angeles, Cal.; treasurer, Benj. D. Smith, Mankato, Minn.

HUMOR OF THE LAW.

Two or three instructors at the Reserve Law School have been laughing themselves sick over the answer made by a student in an examination not long ago.

The question was to define a court of law. Blackstone, who was a good deal of a legal authority in his day, gives as his definition, "A place where justice is judicially dispensed."

The student may have had that definition in mind. But here is what he wrote:

"A court is a place where justice is judicially dispensed with."—Cleveland Plain Dealer.

WEEKLY DIGEST.

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1. **Adverse Possession**—Color of Title.—In ejectment, the fact that plaintiff's deed antedated his grantor's held not fatal to the use of the deed as color of title.—*Owen v. Moxom*, Ala., 52 So. 527.

2. **Effect of Paying Taxes**.—The act of paying taxes on land by one claiming color of title thereto held a taking of the possession and to start limitations prescribed by Kirby's Dig. § 5057, though the payment before the time allowed by section 7053 for the owner to pay is a wrong against the owner.—*Rachels v. Stecher Cooperage Co.*, Ark., 128 S. W. 348.

3. **Hostile Possession**.—The continued occupation of property by a grantor without demand by the grantee for possession, is not adverse to the latter's title, but in subordination thereto.—*Munkwitz Realty & Investment Co. v. City of Milwaukee*, Wis., 126 N. W. 542.

4. **Alteration of Instruments**—Change of Grantee.—Where the grantee in a married woman's deed was changed after she had signed and acknowledged it without her knowledge, and the deed was not re-signed and acknowledged, it was void.—*Ayer & Lord Tie Co. v. Baker*, Ky., 128 S. W. 346.

5. **Animals**—Injuries to Hired Animal.—A company hiring a team to drive over a certain route held liable for damage to the team caused by deviation from such route.—*Broussard v. Sells-Floto Show*, Tex., 128 S. W. 439.

6. **Appeal and Error**—Assignments of Error.—That the verdict and judgment following it did not settle the matter in controversy was fundamental error which the court will consider in absence of assignment of error.—*Provident Nat. Bank v. Webb*, Tex., 128 S. W. 426.

7. **Decisions of Special Tribunal**.—Where a special and exclusive authority is conferred on a court of general jurisdiction, and no appeal is provided, the decision of such court is final, and no appeal lies therefrom.—*Naylor v. Naylor*, Tex., 128 S. W. 475.

8. **Findings**.—A finding based on testimony and on a view taken by the judge at the request of the defeated party, held conclusive on appeal.—*Taussig v. Anderson County Tobacco Growers' Co.*, Tex., 128 S. W. 444.

9. **Instructions**.—In an action for partition, an instruction on the issue of adverse possession held not ground for reversal in the absence of a request for an explanatory charge.—*Wrighton v. Butler*, Tex., 128 S. W. 472.

10. **Review**.—The supreme court will review the legal sufficiency of the evidence to sustain a judgment, and for that purpose will look to all the evidence.—*Gainesville Water Co. v. City of Gainesville*, Tex., 128 S. W. 370.

11. **Review**.—Where the prime cause of injury in an action for negligent death is clearly defendant's negligence in a certain respect, error in submitting whether there was other negligence is harmless.—*Louisville & N. R. Co. v. Massie's Adm'r*, Ky., 128 S. W. 330.

12. **Rulings on Evidence**.—Generally, the ruling of the trial court in admitting or rejecting evidence will not be revised when there is no statement of facts in the record.—*Daniel v. Daniel*, Tex., 128 S. W. 469.

13. **Arbitration and Award**—Consideration.—Where a real controversy between the parties is submitted to arbitration, the agreement for arbitration is mutual, and is based on a sufficient consideration.—*Green-Shrier Co. v. State Realty & Mortgage Co.*, N. Y., 92 N. E. 98.

14. **Assignments**—Claim for Services.—An assignment of a claim for compensation by reason of a master's breach of an employment contract, covering compensation to accrue, held valid.—*Allen v. Chicago Pneumatic Tool Co.*, Mass., 91 N. E. 887.

15. **Attachment**—Mortgaged Property.—No time within which a chattel mortgagee must give notice of his mortgage lien to a creditor of the mortgagor, or the officer attaching the mortgaged property, is prescribed by the statute; but it must be given within a reasonable time after the attachment.—*Congress Inv. Co. v. Reid*, Mass., 91 N. E. 896.

16. **Attorney and Client**—Compensation.—In an action by an attorney to recover a contingent fee, the evidence held to establish that the client was to pay the attorney on such basis.—*Ralley v. Davis*, Tex., 128 S. W. 434.

17. **Bankruptcy**—Acts of Bankruptcy.—The fact that an application by an insolvent corporation to a state court for the appointment of a receiver for its property was not authorized by the laws of the state does not prevent such application from constituting an act of bankruptcy.—*Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, U. S. C. C. of App., Ninth Circuit, 177 Fed. 825.

18. **Benefit Societies**—Burden of Proving Suicide.—Burden held on fraternal benefit order interposing suicide as a defense to show that the circumstances are inconsistent with any other reasonable cause of death.—*Bircher v. Modern Brotherhood of America*, S. D., 126 N. W. 583.

19. **Forfeiture of Insurance**.—Provisions for the forfeiture of a benefit certificate are strictly construed against insurer.—*Brotherhood of Painters, Decorators and Paperhangers of America v. Barton*, Ind., 92 N. E. 64.

20. **Validity of Policy Provision**.—It is reasonable for an insurance company to exact an

obligation from insured not to allow a change to be made in the use of the insured property materially different from that which the insurer has agreed to undertake.—*Siemers v. Meeme Mut. Home Protection Ins. Co., Wis.*, 126 N. W. 669.

21. **Bills and Notes**.—Attorney's Fees.—A right to recover attorney's fees claimed in a petition in an action on notes will be treated as waived on appeal, where plaintiff requested that judgment be rendered on appeal for it pursuant to the mandate of the supreme court, and no evidence was introduced to support the allegation as to attorney's fees.—*State Bank of Chicago v. Holland, Tex.*, 128 S. W. 435.

22. **Lost Instruments**.—Where a note is voluntarily destroyed by the payee for the purpose of destroying the evidence of the debt, no action can be maintained on the debt which the note evidenced.—*Conner v. Martin, Ind.*, 92 N. E. 3.

23. **Payment of Checks**.—A bank upon which checks were drawn against a deposit by a corporation by its treasurer, payable to himself personally, by paying the checks, held to acknowledge the treasurer's authority to so draw them, so that defendant was not required to make inquiry as to his authority to do so.—*Havana Cent. R. Co. v. Knickerbocker Trust Co., N. Y.*, 92 N. E. 12.

24. **Brokers**.—Commissions.—Agents who purchased from their principal for their own benefit held not entitled to recover commissions on account thereof.—*Texas Brokerage Co. v. John Barkley & Co., Tex.*, 128 S. W. 431.

25. **Carriers**.—Delay of Freight.—Where transportation is delayed, carrier must use reasonable care to protect freight during delay.—*White v. Minneapolis & R. R. Ry. Co., Minn.*, 126 N. W. 532.

26. **Ejection of Passenger**.—Under Ky. St. § 806 (Russell's St. § 5350), a conductor may eject a passenger using profane or obscene language, or behaving in a boisterous manner, without waiting until he reaches the next station.—*Louisville & N. R. Co. v. Setser's Adm'r, Ky.*, 128 S. W. 341.

27. **Limiting Liability**.—A carrier, contracting to carry goods beyond his own line, may limit his responsibility to his own line.—*Dodge v. Chicago, St. P., M. & O. Ry. Co., Minn.*, 126 N. W. 627.

28. **Who Are Passengers**.—Where a passenger knowingly disregards the provisions made for his convenience and safety and chooses a course with which he is not familiar, and which he knows was not intended for his use, he becomes a trespasser, or at most a mere licensee, and the carrier's duty is only to refrain from wanton or reckless conduct that would put him in peril.—*Boden v. Boston Elevated Ry. Co., Mass.*, 91 N. E. 879.

29. **Carriers of Passengers**.—Injuries to Passengers.—Personal injuries to a female passenger, resulting from her effort to avoid danger, held to be the direct result of an explosion in the car, accompanied by an outburst of flame.—*Steverman v. Boston Elevated Ry. Co., Mass.*, 91 N. E. 919.

30. **Charities**.—Cy Pres Doctrine.—A trust for the benefit of the colored race, not being sufficient to enable the trustees to carry out the scheme prescribed by the testatrix, held distributable under the cy pres doctrine.—*Grimke v. Malone, Mass.*, 91 N. E. 899.

31. **Gifts for Masses**.—Masses are religious observances, and gifts therefor come within the religious or pious uses which are upheld as public charities.—*In re Kavanaugh's Estate, Wis.*, 126 N. W. 672.

32. **Chattel Mortgages**.—Crops Not Yet Planted.—A mortgage on crops not yet planted is a valid equitable mortgage as between the parties, and will attach to the crop after it is planted and grown.—*Conley v. Nelin, Tex.*, 128 S. W. 424.

33. **Constitutional Law**.—Liquor License.—There is no vested property right in a license to sell intoxicating liquors.—*Gordon v. Corning, Ind.*, 92 N. E. 59.

34. **Taxation**.—In the interpretation of any law relating to taxation attacked as unconstitutional, every intendment must be in favor of its validity.—*In re McKennan's Estate, S. D.*, 126 N. W. 611.

35. **Contracts**.—Consideration.—Forbearance to sue held a good consideration for a promise, unless the claim is known to be frivolous or vexatious.—*Mackin v. Dwyer, Mass.*, 91 N. E. 893.

36. **Rescission**.—One seeking to rescind a contract on the ground of fraud must return or offer to return whatever value he has received under the contract.—*State Life Ins. Co. of Indianapolis v. Nelson, Ind.*, 92 N. E. 2.

37. **Corporations**.—Corporate Stock.—Where an agent of a corporation sold its treasury stock, but delivered his own stock, retaining the price, the buyer could rescind the contract and recover from the corporation the money paid.—*Newhall v. Enterprise Mining Co., Mass.*, 91 N. E. 905.

38. **Foreign Corporations**.—That a foreign corporation had not complied with the law of this state would not prevent it from maintaining an action herein on a school warrant issued for desks sold to a school district.—*A. H. Andrews Co. v. Delight Special School District, Ark.*, 123 S. W. 361.

39. **Forfeiture of Franchise**.—The wrongful act by a foreign corporation which would render a domestic corporation liable to forfeiture will render the foreign corporation liable to forfeiture of its franchise.—*State v. Standard Oil Co., Minn.*, 126 N. W. 527.

40. **Laches**.—Under Rev. St. Mo. 1899, § 971 (Ann. St. 1906, p. 862), a Missouri corporation held to possess the power to acquire real estate.—*Rachels v. Stecher Cooperage Co., Ark.*, 128 S. W. 348.

41. **Ratification of Unauthorized Acts**.—Ratification by a corporation of the act of a person falsely assuming to have authority in the premises may be established by circumstantial evidence.—*Topolewski v. Plankinton Packing Co., Wis.*, 126 N. W. 554.

42. **Stockholder's Suits**.—Before individual stockholders can sue to remedy corporate wrongs, they must first apply to the directors for redress, unless facts are shown which would render an application to the directors useless.—*Minona Portland Cement Co. v. Reese, Ala.*, 52 So. 523.

43. **Costs**.—Right to Bail.—Under Acts 30th Leg., c. 42, accused was entitled to have the distance which the sheriff traveled on a railroad pass when going for him and returning deducted at the rate of three cents a mile from

the costs taxed against accused.—*Buzan v. State, Tex.*, 128 S. W. 388.

44. **Counties**—Assessment for Public Buildings.—In view of Const. art. 8, § 9, as amended in 1890, held, that it was material whether property was valued for the issuance of bonds for the erection of a courthouse in a newly created county by the assessor of such county, or of the county to which it was attached for judicial purposes.—*Rockwall County v. Roberts County, Tex.*, 128 S. W. 369.

45. **Covenants**—Incumbrances.—Liability of land conveyed by deed containing a covenant against incumbrances to assessment for sewers ordered, but not constructed, held a breach of the covenant.—*Cotting v. Commonwealth, Mass.*, 91 N. E. 900.

46. **Criminal Trial**—Assault With Intent to Murder.—Defendant, having been convicted of assault with intent to murder, was not prejudiced by the court's omission to submit the issue of simple assault.—*Lofton v. State, Tex.*, 128 S. W. 384.

47.—**Bill of Exceptions**.—In absence of a bill of exceptions in the record on a criminal appeal, held, that certain objections could not be considered.—*Lemons v. State, Tex.*, 128 S. W. 416.

48.—**Continuance**.—Application for a continuance held to sufficiently show that a witness could not be procured at the same term of court, so as to justify continuance to another term.—*Sweeney v. State, Tex.*, 128 S. W. 390.

49.—**Findings of Court**.—Where a prosecution for disturbing religious worship was tried without a jury, the findings of the trial court on an issue of fact will not be disturbed on appeal.—*Buzan v. State, Tex.*, 128 S. W. 388.

50.—**Instructions**.—An objection that an instruction on the defense of alibi failed to recite defendant's testimony as to his whereabouts is not available where defendant failed to request a more particular instruction.—*Mass v. State, Tex.*, 128 S. W. 394.

51.—**Instructions**.—Any error in the abstract part of a charge on the question of provoking the difficulty as bearing on accused's right of self-defense held not prejudicial to him, in view of the correct application of the law to the specific facts.—*Keeton v. State, Tex.*, 128 S. W. 404.

52.—**Statement of Facts**.—In a prosecution for forgery, where defendant had moved for a new trial and in arrest on the ground of variance between the check set out in the indictment and that offered in evidence, and the statement of facts shows that the check was introduced in evidence, but does not set out the check itself, it will be assumed on appeal that the check as described in the indictment was the one introduced in evidence.—*Gherke v. State, Tex.*, 128 S. W. 380.

53. **Damages**—Mental Anguish.—Mental anguish arising from apprehensions merely of a person injured are not recoverable.—*Vandalla Coal Co. v. Yemm, Ind.*, 92 N. E. 49.

54.—**Penalties**.—Courts incline to treat stipulations for forfeitures for breach of contract as contracts for penalties and to allow a recovery only for actual damages.—*Norman v. Vickery, Tex.*, 128 S. W. 452.

55.—**Punitive Damages**.—Punitive damages are not allowable as a matter of right at all,

unless the wrongful act is performed with bad intent to injure or with reckless disregard of consequences.—*Topolewski v. Plankinton Packing Co., Wis.*, 126 N. W. 554.

56. **Deeds**—Building Restrictions.—The nature of the right and obligation created by building restrictions is such as to render their breach an injury to the fee of other land included within the scheme.—*Stewart v. Finkelstone, Mass.*, 92 N. E. 37.

57.—**Delivery**.—A deed is presumptively delivered at its date.—*Hall v. Kane*, 122 N. Y. Supp. 967.

58.—**Extrinsic Circumstances**.—Where the words "reservation" and "exception" are used together without evincing any definite knowledge of their technical meaning the intention of the parties must be ascertained from the instrument interpreted in the light of the surrounding circumstances.—*City Club of Auburn v. McGeer, N. Y.*, 92 N. E. 105.

59. **Divorce**—Operation of Decree.—In determining the validity of a marriage of a divorced person made outside the state within the time prohibited by Code, § 991, where the validity depends on the domicile, all doubts should be resolved in favor of the validity of the marriage and the legitimacy of the children.—*Pierce v. Pierce, Wash.*, 109 Pac. 45.

60. **Ejectment**—Natural Possession.—Mere payment of taxes, tracing of boundaries, and watching for trespassers do not constitute actual possession of land and timber thereon.—*Albert Hanson Lumber Co. v. Baldwin Lumber Co., La.*, 52 So. 537.

61.—**Sufficiency of Petition**.—Allegations of the petition in an action to recover land held to sufficiently describe the land claimed so as to identify it as required by Civ. Code Prac. § 125.—*Louisville & N. R. Co. v. Taylor, Ky.*, 128 S. W. 325.

62. **Elections**—Local Option.—Election laws are directory as to requirements not affecting the merits, and mandatory only where they affect the merits and declare that a particular act is essential, and its omission shall render the election void.—*Kunkle v. Coleman, Ind.*, 92 N. E. 61.

63. **Electricity**—Instructions.—In an action for death of a telephone lineman from a live wire charged by a sagging wire of defendant, held error to refuse a special charge.—*Cleburne Electric & Gas Co. v. McCoy, Tex.*, 128 S. W. 457.

64. **Equity**—Clean Hands.—Where plaintiff seeking to enjoin defendant from certain acts was himself guilty of the same acts, equity will leave the parties where it found them.—*Ilo Oil Co. v. Indiana Natural Gas & Oil Co., Ind.*, 92 N. E. 1.

65.—**Jurisdiction**.—Where, before delivery, the seller surreptitiously removed a part of the goods and retained the same, the buyer held entitled to relief in equity by a cancellation of so much of the price remaining unpaid as represented the value of the property retained.—*Brown v. Statter, Mass.*, 92 N. E. 78.

66.—**Laches**.—Where one having color of title to land paid taxes thereon for 12 years or more during which time the land greatly enhanced in value, the owner, remaining silent during such years, was barred by laches from equitable relief.—*Rachels v. Stecher Cooperage Co., Ark.*, 128 S. W. 348.

67.—**Violation of Trust**.—Where an action

for violation of a trust obligation is cognizable on the law side of the court, the statute of limitations held to apply, though relief is sought in equity.—*City of Centerville v. Turner County, S. D.*, 126 N. W. 605.

68. **Estoppel—Married Women.**—A married woman held estopped by her acts to deny the validity of a deed on the ground that the name of the grantee had been changed after execution without her knowledge or consent.—*Ayer & Lord Tie Co. v. Baker, Ky.*, 128 S. W. 346.

69. **Evidence—Admissions.**—Admissions by one joint contractor, not made nor assented to by the other, held not conclusive against him.—*Maxwell v. Massachusetts Title Ins. Co., Mass.*, 92 N. E. 42.

70. **Continuance of Condition.**—Goods delivered in good order to an initial carrier are presumed to continue so until they get into the possession of the final carrier.—*Dean v. Toledo, St. L. & W. R. Co., Mo.*, 128 S. W. 10.

71. **Conversation by Telephone.**—Testimony as to a contract had between parties by telephone held admissible.—*National Bank of Ashland v. Cooper, Neb.*, 126 N. W. 656.

72. **Presumptions.**—In the absence of a showing of the facts, the court will not presume facts disclosing the illegality of deeds of land in Arkansas to a foreign corporation while doing business without complying with Kirby's Dig. § 825.—*Rachels v. Stecher Co., Ark.*, 128 S. W. 348.

73. **Testimony of Witness in Another Suit.**—In an action against a carrier for injuries to live stock, testimony offered by defendant as to the evidence of a witness in a former suit against another railroad company for injury to the same stock was inadmissible.—*Gulf, C. & S. F. Ry. Co. v. Peacock, Tex.*, 128 S. W. 463.

74. **Executors and Administrators.**—Appointment.—Though an order of the county court appointing an administrator and showing his qualification did not contain the words "with the will annexed," where his bond contained those words and showed that it was given by him as administrator with the will annexed, such was the legal effect of his appointment.—*Betty v. Petrie, Ky.*, 128 S. W. 320.

75. **De Bonis Non.**—An administrator de bonis non takes the estate in the same condition in which his predecessor left it, and all acts lawfully done by the former administrator are binding on the successor.—*Bray v. Darby, Ohio*, 91 N. E. 861.

76. **Services of Administrator.**—Services rendered by the administrator in investigating a third person's claim to ownership of a part of the estate, wherein the services of attorneys were required, are a proper charge against the estate.—*In re Lichtenberg's Estate, Wash.*, 109 Pac. 48.

77. **Fire Insurance.**—Effect of Denying Liability.—An unqualified denial of liability by an insurer upon receipt of proofs of loss is a waiver of an arbitration clause of the policy.—*Cash v. Concordia Fire Ins. Co. of Milwaukee, Wis.*, Minn., 126 N. W. 524.

78. **Fraud—Invalid Contract.**—One may either sue for damages caused by fraudulent representations inducing him to execute a contract or rescind the contract, but cannot do both.—*Church v. Baumgardner, Ind.*, 92 N. E. 7.

79. **Frauds, Statute Of—Pleading.**—Where a bill to establish a trust in land relied on an oral declaration of trust, and did not ask for a conveyance, the statute of frauds, though not pleaded, was available as a defense to the bill.—*Tourtillotte v. Tourtillotte, Mass.*, 91 N. E. 909.

80. **Guardian and Ward—Bonds.**—That a guardian, after the ward's death, holds the funds until surrendered to the persons entitled thereto, does not authorize the county judge to require a new bond.—*Cornelison's Adm'r v. Million, Ky.*, 128 S. W. 316.

81. **Habens Corpus—Custody of Child.**—The right of a parent to the custody of the child is subordinate to the welfare of the child, and will be denied where the good of the child demands it.—*State v. Bell, Wash.*, 109 Pac. 51.

82. **Highways.**—Establishment by Prescription.—By continuous adverse user under claim of right for 10 years, the public may acquire a highway along a section line through cultivated fields.—*Brym v. Butler County, Neb.*, 126 N. W. 521.

83. **Establishment by User.**—To establish highway by user, the public must have traveled a definite path for 10 consecutive years under a claim of right.—*Smith v. Nofsinger, Neb.*, 126 N. W. 659.

84. **Homicide.**—Assault with Intent to Murder.—Under an indictment for assault with intent to murder, the court, in submitting aggravated assault, was authorized to submit assault by an adult male on a female, though not specifically alleged.—*Lofton v. State, Tex.*, 128 S. W. 384.

85. **Intent.**—If defendant, in an attempt to shoot his son, unintentionally killed his daughter, he was guilty of murder in the first degree.—*People v. Loose, N. Y.*, 92 N. E. 100.

86. **Injunction—Building Restrictions.**—Relief against a violation of a building restriction will be granted only when sought with diligence.—*Loud v. Pendergast, Mass.*, 92 N. E. 40.

87. **Trespass.**—Where defendant's maintenance of a fence on the right of way of plaintiff railroad company did not materially interfere with the operation of the road, plaintiff was not entitled to relief by injunction.—*Louisville & N. R. Co. v. Taylor, Ky.*, 128 S. W. 325.

88. **Insane Persons.**—Power of State.—The legislature is the successor of the Crown of England as parens patriae in the case of idiots and lunatics.—*In re Thaw, 122 N. Y. Supp.* 970.

89. **Interpleader.**—Interest.—Where an interpleader did not pay the money in his hands into court when ordered to do so, but kept and used it, he should be compelled to pay interest thereon.—*Millett v. Swift, Ky.*, 128 S. W. 312.

90. **Intoxicating Liquors.**—Excessive License Fees.—Where an applicant for a liquor license pays under protest an amount in excess of the established fee, he may recover such excess in an action against the city as for money had and received.—*Gillen v. City of South St. Paul, Minn.*, 126 N. W. 624.

91. **Judges.**—Disqualification.—A chancellor whose property is located in paving district held not disqualified to sit in a suit to enforce assessment for paving in the district.—*Osborne v. Board of Improvement of Paving Dist. No. 5 of Ft. Smith, Ark.*, 128 S. W. 357.

92. **Judgment.**—Modification.—At common law all final judgments and decrees of the court pass beyond its control after the end of the term.—*State v. Steiner, Wash.*, 109 Pac. 57.

93. **Res Judicata.**—A general judgment for defendant in trespass to try title, in which the location of a boundary line was the only issue, held valid, though the answer did not attempt to fix the boundary line.—*Provident Nat. Bank v. Webb, Tex.*, 128 S. W. 426.

94. **Judicial Sales.**—Attack for Fraud.—That the judgment under which corporate stock was sold under execution is valid does not preclude an attack on the sale for irregularities calculated to affect the price for which the stock was sold.—*First Nat. Bank of Houston v. South Beaumont Land & Improvement Co., Tex.*, 128 S. W. 436.

95. **Jury.**—Summoning Jurors.—Under Code Cr. Proc. 1895, arts. 684-686, denial of motion to require that all regular jurors drawn for the week be brought into court by process before talesmen were summoned held not error.—*Sweeney v. State, Tex.*, 128 S. W. 390.

96. **Landlord and Tenant.**—Action for Rent.—In an action for rent, where the plaintiff has a right to retake possession for default by the lessee without the re-entry working a forfeiture of the rent, a prima facie case for the plaintiff is not made by the introduction in evidence of the lease without further testimony.—*Yale Realty Co. v. Olney, Minn.*, 126 N. W. 625.

97. **Effect of Fire.**—Destruction by fire of leased building held not to release tenant from payment of rent.—*Bowen v. Clemens, Mich.*, 126 N. W. 639.

98. **Larceny.**—Prosecutions.—In a prosecution for larceny of a check, it is not necessary to

allege that the check was indorsed by the payee so as to make it negotiable.—*State v. Hinton, Ore.*, 109 Pac. 24.

99. **Libel and Slander**—Criticism of Public Officials.—A fair and honest criticism by a newspaper of a public officer is permitted in the interest of the public welfare, and becomes defamatory only when an attack is made on the motives or character of the officer.—*Hoey v. New York Times Co.*, 122 N. Y. Supp. 978.

100. **Life Insurance**—Death Caused by Beneficiary.—The beneficiary in a life insurance policy cannot recover thereon, where the death of the assured is caused by the intentional and felonious act of such beneficiary.—*Filmore v. Metropolitan Life Ins. Co.*, Ohio, 92 N. E. 26.

101. **Limitation of Actions**—Mortgage Foreclosure.—Foreclosure of a mortgage held not barred by the running of limitations against the indebtedness.—*Green v. Frick, S. D.*, 126 N. W. 579.

102. **Master and Servant**—Vice Principal.—A distinct and independent employee to whom is delegated the duty to disconnect and make safe electric wires on which others must work is ordinarily a vice principal, and not a fellow servant with the linemen and other like workmen.—*Massy v. Milwaukee Electric Ry. & Light Co.*, Wis., 126 N. W. 544.

103. **Mortgages**—Foreclosure.—Where, after the purchaser at foreclosure had been placed in possession, he was ousted under a subsequent judgment in forcible entry and detainer, his right to possession could not be determined on a subsequent writ of assistance.—*Leach v. Rosebrook, Ala.*, 52 So. 521.

104. **Municipal Corporations**—Liability of Land Owner.—An owner or occupant of land, who collects surface water into a channel and discharges it on a highway, so as to make it unsafe, creates a public nuisance, and he is liable for injuries to a traveler caused thereby.—*Maloney v. Hayes, Mass.*, 91 N. E. 911.

105. **Municipal Corporations**—Public Improvements.—In a suit to enforce a paving assessment, the burden is on defendants to show that the assessments were not properly levied.—*Osborne v. Board of Improvement of Paving Dist. No. 5 of Fort Smith, Ark.*, 128 S. W. 357.

106. **Ne Exeat**—Common Law.—Writs of ne exeat are governed by common law and general equity jurisprudence.—*Dunsmoor v. Bankers' Surety Co.*, Mass., 91 N. E. 907.

107. **Negligence**—Use of Premises.—Persons using their premises to transact business with the public owe to those accepting the invitation to deal with them the duty of using ordinary care to make reasonably safe the place or places assigned to such use, but this does not extend to parts of the establishment to which the public is not invited.—*Stamford Oil Mill Co. v. Barnes, Tex.*, 128 S. W. 375.

108.—**Who Are Licensees**.—A newsboy, entering a stone quarry to sell papers held to be a licensee.—*Norris v. Hugh Nawn Contracting Co.*, Mass., 91 N. E. 886.

109. **Partnership**—Agency of Partner.—A member of a firm is not the agent of each partner individually, and cannot bind any member less than the whole as a firm.—*State v. Burns, S. D.*, 126 N. W. 572.

110.—**Release**.—A debtor of a firm, having fraudulently conspired with one of the partners to release a partnership claim against it, held a proper party to a suit for an accounting, in which the court would determine the validity of the release.—*Anable v. McDonald Land and Mining Co.*, Mo., 128 S. W. 38.

111. **Pleading**—Misjoinder of Causes.—A complaint, in an action for personal injuries, with an allegation as to injuries to personal property, is demurrable for misjoinder of causes.—*Vock v. Auterborn*, 122 N. Y. Supp. 1023.

112. **Principal and Agent**—Mortgage.—Act of a person supplied with money to satisfy a mortgage who took an assignment thereof to himself held a payment of the mortgage debt by the owner.—*Crile v. Fries, Neb.*, 126 N. W. 655.

113. **Property**—Ownership.—Though there is a presumption that one shown to be the owner of a note continues to own it, this may be overthrown by evidentiary circumstances ren-

dering it probable that the fact is otherwise.—*Conner v. Martin, Ind.*, 92 N. E. 3.

114. **Railroads**—Contributory Negligence.—A traveler held not guilty of contributory negligence in crossing a railroad crossing without first stopping and examining the condition of the crossing.—*Nashville, C. & St. L. Ry. v. Ragan, Ala.*, 52 So. 522.

115.—**Negligence**.—The running of a train at a high speed held not actionable negligence.—*Illinois Cent. R. Co. v. Dupree, Ky.*, 128 S. W. 334.

116. **Sales**—Conditions of Contract.—A buyer of a crop of tobacco may not offer to assort it and take the merchantable tobacco on condition that the tobacco shall first be sweated, not provided for in the contract of sale.—*Taussig v. Anderson County Tobacco Growers' Co.*, Tex., 128 S. W. 444.

117. **Street Railroads**—Action for Injury.—In an action against a street railroad company for injuries due to a collision with plaintiff's carriage, refusal of court to submit the question of motorman's incompetency to the jury held not error.—*Doll v. Louisville Ry. Co., Ky.*, 128 S. W. 344.

118. **Taxation**—Tax Sales.—Where a sale of land for taxes was invalid as to certain interests, the owners thereof were only chargeable with expenditures by the tenant in possession necessary to preserve the property, and for taxes and municipal improvement assessments, etc.—*Hatcher v. Howes, Ky.*, 128 S. W. 335.

119. **Telegraphs and Telephones**—Common Carriers.—A carrier of messages by telegraph is a common carrier required to use "the utmost diligence."—*Lothian v. Western Union Telegraph Co.*, S. D., 126 N. W. 621.

120.—**Nature and Importance of Message**.—A sender of a telegram held authorized to inform the company of the nature of a message and its financial importance.—*Vermilye v. Postal Telegraph Cable Co.*, Mass., 91 N. E. 904.

121. **Trespass to Try Title**—Issues.—In order to determine to whom a strip claimed in trespass to try title belonged, held necessary to determine whether the boundary line between the surveys of the respective parties was located so as to include it within the survey owned by plaintiff or by defendant.—*Provident Nat. Bank v. Webb, Tex.*, 128 S. W. 426.

122. **Trial**—Direction of Verdict.—That plaintiff's evidence was so contradictory that all of it could not be true did not authorize the direction of a verdict.—*Eustis v. Boston Elevated Ry. Co.*, Mass., 91 N. E. 881.

123. **Use and Occupation**—Liability of Occupant.—A city continuing in possession of land after conveying it no demand having been made for possession by the grantee, is under no implied agreement, and is not liable to the grantee for the use of the property as on contract.—*Munkwitz Realty & Investment Co. v. City of Milwaukee, Wis.*, 126 N. W. 542.

124. **Waters and Water Courses**—Franchise of Water Company.—In a suit by a city to forfeit the franchise of a water company on the ground of its insolvency and consequent inability to perform its franchise obligations, the value of the bonds of the corporation and the matter of the payment is not to be considered.—*Gainesville Water Co. v. City of Gainesville, Tex.*, 128 S. W. 370.

125. **Wills**—Lapse.—Where a lapse under a will is not in the residuary clause, lapsed gifts pass under it.—*Clark v. Mac, Mich.*, 126 N. W. 632.

126.—**Rights of Legatees**.—Legatees succeed to the estate of the testator as beneficiaries, and have no rights or equities whatever against creditors.—*O'Donnell v. McCann*, N. J., 75 Atl. 999.

127. **Witnesses**—Cross-Examination.—A state's attorney held entitled to ask on cross-examination of a witness in a homicide case whether the witness had not been indicted for a certain assault.—*Keeton v. State, Tex.*, 128 S. W. 404.

128. **Work and Labor**—Effect of Contract.—Where complete performance of a contract has been prevented by the fault of defendant, plaintiff may sue for the value of that which he has done under the contract.—*Carlson v. Sheehan*, Cal., 109 Pac. 29.